

Heavenly Principles?

## The Translation of International Law in 19th-Century China and the Constitution of Universality

### Abstract

Modern international relations are established on the acceptance of international law as the rules of conduct. But how does this legal order, which originated from European jurisprudence, acquire its universality? How did this legal order, in the time of European colonial expansion, interact with other systems of law, which formed the sociopolitical foundation of the non-Western powers, such as China? These are the two main problems being addressed by this study, which focuses on the translation of Western writings, particularly those by American jurist Henry Wheaton, and legal documents on international law in China from the late 19th century. This article, which takes a legal comparative perspective, argues the clashes between China and European colonial powers by nature were disputes between the jurisdictions. The clashes reflect the realpolitik struggles between two powers, as well as the limitation of 19<sup>th</sup>-century international law based on the acceptance of a Eurocentric universalism.

**Key Words:** History of International Law, Legal Translation, Jurisprudence, *Tianxia* World-view, *gongfa*, Public International Law



## 1. Introduction

By the end of the 19th century, the world had witnessed a wave of legal reforms in the non-Western world, and those reforms resulted in the positivist transformation of state sovereignties. This globalisation of European legal principles was accompanied by colonial expansion. As John Gallagher points out, this colonial expansion goes beyond a simple form of territorial domination and becomes the ‘imperialism of free trade’.<sup>1</sup> Safeguarding lucrative trade routes, hence, became the priority of diplomacy, both in and outside Europe. To regulate the commercial and diplomatic activities in Europe, international law was generally received as a protocol, especially after the 1815 Vienna Congress.<sup>2</sup> To some scholars, this practice of using the law to regulate international conduct conveyed a Western jurisprudence, which expanded to the non-Western world through colonialism. Turan Kayaoğlu refers to the dominance of the Western legal episteme, developed through European colonial expansion, as ‘legal imperialism’.<sup>3</sup> This process was accompanied by a systematic discrimination against the ‘savage’ legal systems of the colonised, which led to the ‘transfer of laws and legal institutions from one society to another’.<sup>4</sup>

To China, this process appeared to be complex. Contemporary Chinese historiography denotes Chinese society during the late Qing Dynasty (1840-1911) as ‘semi-colonial’.<sup>5</sup> In addition to being political rhetoric, this term reflects the historical reality of the Chinese encounter of foreign imperialism. Despite the absence of an institutional colonial

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<sup>1</sup> John Gallagher and Ronald Robinson, "The Imperialism of Free Trade," *The Economic History Review, New Series* 6, no. 1 (1953). 1–15.

<sup>2</sup> Rune Svarverud, *International Law as World Order in Late Imperial China, Translation, Reception and Discourse, 1847-1911* (Leiden: Brill, 2007). 45.

<sup>3</sup> See Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge: Cambridge University Press, 2010). 13.

<sup>4</sup> Sally Engle Merry, "Review: Law and Colonialism," *Law & Society Review* 25, no. 4 (1991). 889–922.

<sup>5</sup> This concept of ‘semi-colonial state’ derives from Vladimir Ilyich Lenin’s famous analysis of imperialism. V. I. Lenin, "Imperialism, the Highest Stage of Capitalism," in *Lenin Selected Works* (Moscow, USSR: Progress Publishers, 1970). 702.

order in China, the Chinese encounter with foreign imperialism still shatters its self-perception of being the ‘Middle Kingdom’ in the traditional Confucian ‘*tianxia*’ (literally means ‘everything under the heaven’) world view.<sup>6</sup> There were three main channels that consolidated the political reality for such a legal transformation. First, there was the signing of bilateral or multilateral treaties between the Qing Empire and the Euro-American powers. Second, there was the Chinese translation of Euro-American legal and political writings. The third channel involved Chinese reformist intellectuals, especially those who studied law and related subjects abroad.

The Western colonial presence in China during the 19th century constituted the political environment that called for an ‘active struggle’, both intellectually and politically, to cope with the changing world order.<sup>7</sup> During the late 19th century, Chinese intellectuals and royal officials began to discuss the possibility of ‘*bianfa*’ (literally means ‘change law’). The process of *bianfa* involved a political attempt to transform state legislation by following the principles that constituted modern Western sovereign states. It also called for educational and military reforms, which eventually contributed to China’s revolutionary transition from a Confucian empire to a modern republic.

Academic interpretations of this process have largely focused on the emergence of the prevailing influence of Western international law as a universal knowledge that challenged, and eventually replaced, non-Western languages of universalism.<sup>8</sup> How did the pragmatic diplomatic practices of the West lead to Chinese recognition of 19th century European sovereignty? How did Western international law, as a ‘positive morality’, pave the way for the positivist transformation of Chinese law?

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<sup>6</sup> John K. Fairbank, ed. *The Chinese World Order: Traditional China’s Foreign Relations* (Cambridge, MA: Harvard University Press, 1970). 2–5.

<sup>7</sup> Immanuel C. Y. Hsü, *The Rise of Modern China*, 6 ed. (New York: OUP USA, 2000). 14.

<sup>8</sup> Lydia Liu, “Legislating the Universal: The Circulation of International Law in the Nineteenth Century,” in *Tokens of Exchange*, ed. Lydia Liu (Durham: Duke University Press, 1999). 1–12. Also see Svarverud, *International Law as World Order in Late Imperial China, Translation, Reception and Discourse, 1847–1911*, 1–19 and 69–70.

How should we interpret the internal transformation and development of Chinese jurisprudence under the influence of Western pragmatic diplomacy, and under the idealistic interpretation of Western international law by American missionaries?

This paper examines the Chinese translations and interpretations of Western international law between 1839 and 1895. The systematic translation of modern international law, under American influence, began in China in the 1860s. William Alexander Parsons Martin, an American Presbyterian missionary to China, translated Henry Wheaton's *Elements of International Law* (hereafter *EIL*) into Chinese under the title *Wanguo Gongfa* (萬國公法 Public Law for Ten Thousand Nations, hereafter *WGGF*). As this paper shows, through Martin's translations and interpretations, Western international law appeared to be based on strong natural legal characteristics rather than the fruit of 19<sup>th</sup>-century European legal positivism. In Martin's reading, natural law affirms the universality of Christianity. By discussing the 'analogous rules' of the Zhou Dynasty that dealt with divided nations, Martin correlated Confucius' concept of *Chunqiu Gongfa* (春秋公法 Public law in Spring and Autumn Period) with the European idea of natural law, which focused more on the moral rationale and principles behind the rule of law. Martin translated the term 'Natural Law' as '*xingfa*' (性法 literally means law of human nature).<sup>9</sup> This ecumenist attempt appeared to be broadly accepted by Chinese reformists, such as Kang Youwei, Zheng Guanying, Chen Chi and Liang Qichao. However, as this paper argues, Chinese intellectuals' *gongfa* thinking transcended Martin's (mis)interpretation of international law. By mobilising traditional Confucian knowledge, they attempted to constitute a Confucian universality that narrated the changing world order.

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<sup>9</sup> Henry Wheaton, *Wanguo Gongfa*, trans. W.A.P. Martin (Beijing: Jingdu Chongshiguan, 1864). Also Xuezhong Lin, *Cong Wanguo Gongfa Dao Gongfa Waijiao: Wanqing Guojifa De Chuanru, Quanshi Yu Yingyong* (from Public International Law to International Diplomacy: The Introduction, Interpretation and Application of International Law in Late Qing Period) (Shanghai: Shanghai Guji Press, 2009). 220–30.

The reinterpretations of *Chunqiu Gongfa* by intellectuals, who studied abroad or served as diplomats, such as Zeng Jize, Ma Jianzhong and Xue Fucheng, were similar to legal positivism.

This work uses universality to highlight the underlining tendency of legal episteme, which intends to systematically map and regulate the world. A key subject within the legal episteme analysed in this paper is jurisprudence. This paper acknowledges the plurality of jurisprudence in the 19th century, and it examines the intensive struggles among them, namely legal positivism, natural law, and Chinese ‘*gongfa*’ thinking. Such conflicts were represented through diplomatic clashes and intellectual debates. These clashes and debates created a rich context, through which we could decipher the 19<sup>th</sup>-century Euro-American legal discourse, and through which we could understand its hegemonic impact toward the non-Christian world in general.

## **2. The Contradictory Encounter of International Law in 19<sup>th</sup>-century China**

To China, the ‘*tianxia*’ world view was a discourse on universalism regulating its international and domestic activities for a long time. In the Chinese ‘*tianxia*’ world view, the differentiation between ‘*hua*’ (civilised) and ‘*yi*’ (barbarian) was crucial to regulating relations, both within and outside the China’s political and cultural domain. In Confucian tradition, the two concepts must not be considered as simple identification of ethnicity, but rather recognition of cultural differences. This relationship reveals the importance of employing customary tradition when interacting with the ‘*yi*’, and in providing ‘*yi*’ with the possibility of cultivation, so they can transform into ‘*hua*’. Both customary norms (*li*) and codified rules (*fa*) constitute coherent Chinese traditional law. In Confucian tradition, ‘*li*’ connotes the virtue of propriety. ‘*Li*’ and ‘*ren*’ (benevolence) are the pillars of Confucius’ social order.<sup>10</sup> The

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<sup>10</sup> Immanuel C. Y. Hsü, "China's Entrance into the Family of Nations: The Diplomatic Phase 1858-1880," (Cambridge, MA: Harvard University Press, 1960). 111.

formality of *li* was socially bounded.<sup>11</sup> Hence, it provides space for accommodating foreign customs without jeopardising the coherence of Confucius' universality.

Historical cases indicate China's imperial legal system appeared to have the flexibility of incorporating foreign customs and adjusting Chinese law to accommodate subjects from a non-Confucian background.<sup>12</sup> The concept of international law was first considered to be a 'barbarian technique (*yiji*)' that was practical for dealing with subjects who were unfamiliar with Confucian jurisprudence. Jesuit missionaries were considered the conduit in between.<sup>13</sup> Principle of European international law was first practised during the negotiations between the Qing and Russian empires that resulted in the signing of the *Treaty of Nerchinsk* (1689). The treaty was considered an 'unusual one', as the *Jus Gentium* was observed in both the negotiation and ratification processes with an intensive involvement of Thomas Pereira.<sup>14</sup>

However, the absence of such confidence appeared after China's traumatic defeat in the realpolitik struggle in the 19th century. Subsequently, a growing number of Chinese reformist and revolutionary intellectuals began to share an essential urge to join the 'family of nations', and to regain 'sovereign rights'. They proposed various approaches to achieve this goal. To conduct legal reformation, or to reform the nation via constituting the new 'national citizen' (*xinmin*), or through revolutionary liberation of people, they demonstrated their ambition to constitute the modern Chinese citizenship.<sup>15</sup> As a phenomenon, the Qing empire was irreversibly constituted into a 'universal' language of diplomacy, politics, and equality,

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<sup>11</sup> Tung-Tsu Chu, *Law and Society in Traditional China* (Westport, Conn: Hyperion Press, 1979). 278-9.

<sup>12</sup> Ermin Wang, *Wukou Tongshang Bianju (the Changing Situation of Treaty Ports System)* (Guilin: Guangxi Normal University Press, 2006). 91-104.

<sup>13</sup> Svarverud, *International Law as World Order in Late Imperial China, Translation, Reception and Discourse, 1847-1911*. 38.

<sup>14</sup> Joseph Sebes, *The Jesuits and the Sino-Russian Treaty of Nerchinsk (1689): The Diary of Thomas Pereira, S. J.* (Rome: Institutum Historicum S. I., 1962).

<sup>15</sup> Zhongjiang Wang, *Jindai Zhongguo Siweimoshi Yanbian De Qushi (the Trend of the Evolution of Modern Chinese Intellectual Paradigm)* (Chengdu: Sichuan Renmin Press, 2008). 82-176, and 371-81.

which was enforced via military conquest and consolidated by multilateral treaties.<sup>16</sup> However, greater scholarly attention must be focused on the complexity of intellectual and political struggles behind the formation of such a modern ‘universality’.

As the balance of power shifted among European nations, and as British colonial expansion increased in China during the 19th century, European international law evolved into a general rule of conduct that challenged the legality of the Chinese *tianxia* world view. Both the *Treaty of Nanking* (1842) and the *Treaty of Tien-Tsin between the Queen of Great Britain and the Emperor of China* (1858, hereafter the *Treaty of Tien-Tsin*) contained articles that specified the equality of formality in diplomatic conduct. The latter treaty also imposed the famous legal injunction against China’s Qing government by using the word ‘yi’ to describe the British in official documents.

To pragmatic European diplomats and jurists in the 19th century, European international law applied only to the Christian world.<sup>17</sup> This conveniently justified the exception of the non-Western/Christian world as subjects of international law. In the context of 19th-century realpolitik struggles, Christian universalism became a pragmatic standard, which defined norms and expelled abnormalities. While conflicts in Europe shaped the general rules for international interactions (especially wars) among European states, expansion in the non-European world posed a new challenge.<sup>18</sup> Hence, it was best not to apply this ‘code of chivalry’ while interacting with the ‘semi-civilised’ or ‘uncivilised’ world. For example, when making a formal declaration of war prior to commencement of hostilities, this code of conduct was often breached when one of the belligerents was a ‘semi-civilised nation’.<sup>19</sup> Under such an attitude, Martin’s

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<sup>16</sup> James L. Hevia, *English Lessons: The Pedagogy of Imperialism in Nineteenth-Century China* (Durham: Duke University Press, 2003).

<sup>17</sup> Wilhelm G. Grewe, *The Epochs of International Law* trans. Michael Byers, Illustrated, revised ed. (Berlin: Walter de Gruyter, 2000). 464. Also Alexander Orakhelashvili, "The Idea of European International Law," *Eur J Int Law* 17, no. 2 (2006). 315-47.

<sup>18</sup> Theodore J. Grayson, "The War in the Orient in the Light of International Law," *The American Law Register (1898-1907)* 53, no. 11 (1905). 672-97.

<sup>19</sup> *Ibid.*



translation of international law was loathed by some European diplomats. M. Klecskowsky, then-French *chargé d'affaires*, criticised 'this man who is going to give the Chinese an insight into our European international law', and he suggested 'this man' should be choked off.<sup>20</sup>

Such exceptionism also worked to exempt European citizens from being subjects of Chinese law. The first Opium War (1840-42) marked the beginning of ongoing trade-related conflicts between China and Western nations. In the case of the opium trade, British justification for waging war against China was not over the morally questionable issue of protecting the opium trade, but over the 'methods used by Chinese officials' to treat the 'British subjects'. According to Lord Palmerston's letter to Emperor Daoguang, the war was intended to rescue British merchants in China from the 'barbarous fate which awaited them'.<sup>21</sup> Discrediting the Chinese legal system as 'barbarous' paved the way for the installation of British consular jurisdiction in China, which was ratified in the *Treaty of the Bogue* in 1843. By manufacturing opposition against 'barbarous' China, European nations' practice of political and ideological expansion in China could still be justified under the rhetoric of carrying out a 'civilising mission'.<sup>22</sup> The convenience of operating outside the sanction of Chinese law intrigued other nations with a presence in China, and it was soon requested by the US (1844), France (1844), and later Japan (1871).

However, to the Christian missionaries, especially a Presbyterian missionary like W.A.P. Martin, Christian universality reflected an evangelical message, which would eventually enlighten each person on earth.<sup>23</sup> 'Civilisation' was

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<sup>20</sup> W. A. P. Martin, *A Cycle of Cathy, or China, South and North with Personal Reminiscences*, 3 ed. (New York: Fleming H. Revell Company, 1900). 234.

<sup>21</sup> Hosea Ballou Morse, *The International Relations of the Chinese Empire*, 3 vols., vol. 1 (New York: Paragon Book Gallery, 1900). 624. A detailed discussion of the British attitude towards the opium trade, please see Glenn Melancon, "Honour in Opium? The British Declaration of War on China, 1839–1840," *The International History Review* 21, no. 4 21, no. 4 (1 December 1999). 855-74.

<sup>22</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004). 32-144.

<sup>23</sup> For detail discussions on W.A.P. Martin's Presbyterian theology, please refer to Ralph Covell, *W. A. P. Martin: Pioneer of Progress in China* (Washington D.C.: Christian University Press, 1978). 8-21.

considered a developed stage of human enlightenment. Early Jesuit missionaries were even willing to make compare equally Confucian moral doctrines and Christian teachings when preaching. In many cases, the ability to cite Confucian classics to support their arguments proved beneficial when they introduced Christianity to Chinese intellectuals and officials.<sup>24</sup> In practice, Martin treated Confucius' nine classics as collections of 'moral teachings', which were antiquities that conveyed universal values. In his reading, the *Four Books*, a collection of four Confucian canons composed after Confucius, were the 'New Testament of China', but with a legal significance to Chinese society that resembled the role of the Talmud in Judaism.<sup>25</sup>

Martin's interpretation of modern Western international law emphasises moral universality. However, the political reality in 19th-century China posed a serious challenge to his interpretation of the law. On the one hand, European states were reluctant to abide by international law outside the 'Christian world', as they considered the newly formed principles as overly restrictive. Their practice of realpolitik in China appeared to be in line with the thriving trend of legal positivism among 19<sup>th</sup>-century Western jurists.<sup>26</sup>

On the other hand, Christian missionaries, in their legal translations, advocated international law as a form of universal morality, which was applicable across the globe without prejudice. Both Martin and John Fryer tended to advocate the European natural law tradition, which was deemed to be similar to traditional Chinese Confucian morality. Through their translations, concepts such as 'equality' and 'right' were introduced to Chinese in a natural law context. During the 19th

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<sup>24</sup> Liam Matthew Brockey, *Journey to the East: The Jesuit Mission to China, 1579-1724* (Cambridge, Mass.: Belknap Press, 2008). 187. For the detailed discussions on Christian missionary works in China, especially their methods and social impacts, please refer to John K. Fairbank, *The Cambridge History of China*, vol. 10 (Cambridge: Cambridge University Press, 2002). 543-90.

<sup>25</sup> Martin, *A Cycle of Cathy, or China, South and North with Personal Reminiscences*. 59-60.

<sup>26</sup> Nico Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order," *The European Journal of International Law* 16, no. 3 (2005). 369-408.

century, China's political encounters with such concepts were through intercourse with Western hegemonic powers, which largely operated on the basis of realpolitik. It was in this paradoxical context that the history of China's reception of modern international law unfolded.

### **3. The Struggle between Two Systems of Jurisprudence: A Discursive Analysis**

#### **A. 'Tianli' and 'Renqing': Chinese Jurisprudence**

The first attempt to translate Western international law in China was a practical choice. In 1839, Lin Zexu, the commissioner in Canton, wrote an official letter to Queen Victoria.<sup>27</sup> Although Lin's use of international legal concepts was no more than a utilitarian attempt to solve the opium problem in China, the attempt revealed, at least for some officials, there was a need to use the Western method to conduct international interactions. In his letter, Lin cited Emerich de Vattel's *Le droit des gens* (1758), which had been recommended to Lin by Peter Parker, an American diplomat. Parker and Yuan Dehui were commissioned for the translation. Eventually, four articles that focused on the rights to confiscate smuggled goods were translated. These four articles appear in Wei Yuan's *Haiguo Tuzhi*, which was published in 1847.<sup>28</sup>

Intertextuality exists between the Chinese translation of de Vattel's work and Lin's letter to Queen Victoria. In his letter, Lin began his argument by stating two 'universally acknowledged principles', namely 'whatever is beneficial to *tianxia* (the world), [the Chinese emperor] will publicise it (与天下公之). Whatever is harmful, [He] will eliminate it for *tianxia* (为天下去之)'. On behalf of 'the Heart of Heaven and Earth', the Emperor could carry out such *jus cogens* norms with

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<sup>27</sup> SSu-Yu Teng and John K. Fairbank, eds., *China's Response to the West, a Documentary Survey 1839-1923* (New York: Atheneum, 1971). 24-8.

<sup>28</sup> Yuan Wei, *Haiguo Tuzhi*, ed. Zongtang Zuo, 24 vols., vol. 21 (Pingqing 1876).

‘equal benevolence’.<sup>29</sup> To Lin, the universality of Chinese jurisprudence came from the common moral ground of mankind. He argues the opium trade ‘rouses indignation in every human heart, and is utterly inexcusable in the eyes of celestial reason’.<sup>30</sup> The phrase ‘every human heart’ is used to translate the Chinese term ‘*renqing* (人情)’; while ‘celestial reason’ is used to translate ‘*tianli* (天理)’. The two concepts were consolidated to become the foundation of statutes that reflected Chinese jurisprudence during the Ming and Qing dynasties.<sup>31</sup> The preamble of the Great Qing Code (大清律例 *Ta Tsing Leu Lee*) revised in 1740, emphasises the codification of Qing statutes was based on the spirit of ‘*tianli*’ and ‘*renqing*’, so every part of the Great Qing Code is arranged to ensure ‘universal application’ and ‘justice’.<sup>32</sup> In Sir George Staunton’s translation, ‘*tianli*’ and ‘*renqing*’ were referred to as ‘heavenly principles’ and ‘human sentiment’ respectively.

The different translations of these terms reveal an intriguing divergence in European legal narratives. The previous Christian missionaries’ narrative eliminates the legal essence of the Chinese terms, and presents them in line with Christian universality. Such representation makes Lin’s work appear to be a moral argument with no legal substance. However, to European legal philosophers, especially after the emergence of the natural law tradition, the formalist law requires the presentation of legal logic from the principle of protecting individual rights.<sup>33</sup> The justice and fairness of the legal system is therefore understood, as natural law jurists argue, from an

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<sup>29</sup> English translation of this letter appears in *Chinese Repository*. ‘Letter to the Queen of England, from the High Imperial Commissioner Lin, and His Colleagues,’ *Chinese Repository* VIII, no. 10 (February 1840). Its original draft in Chinese can be found in Zexu Lin, *Lin Zexu Ji : Gong Du* (Collection of Lin Zexu's Works: Official Correspondences) (Beijing: Zhonghua Shuju, 1963). 125-7. The English translation here was by myself.

<sup>30</sup> Zhiguang Fang and Yanfa Zhou, eds., *Linshi Jiancang Lin Zexu Shi Yuan Liangguang Zougao* (Nanjing: Nanjing University Press, 1988). 90.

<sup>31</sup> Li Chen, ‘Law and Sensibility of Empire in the Making of Modern China, 1750-1900,’ in *UMI Microform* (New York: Columbia University, 2009). And Yonglin Jiang, *The Mandate of Heaven and the Great Ming Code* (Washington: University of Washington Press, 2011).

<sup>32</sup> Tao Tian and Qin Zheng, eds., *Daqing Lüli (the Great Qing Code)* (Beijing: Law Press, 1998). 4-5.

<sup>33</sup> Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, trans. Ephraim Fischhoff, 4 ed., 2 vols., vol. 1 (Berkeley: University of California Press, 1978). 657.

individual basis. Equality is based on the recognition of individual rights, while the right to self-preservation and the right to property are recognised as two fundamental human rights. Therefore, 19<sup>th</sup>-century European colonial expansion toward ‘uncivilised’ territory, and the spirit of ‘power balance’ within European countries, could be rationalised in the logic of the natural law system.

One of the main issues Lin intended to defend was the importance of aliens (*waiyi* 外夷) in China respecting Chinese law. According to the Qing code, foreigners living in China were subject to Chinese (Qing) law. To the Qing government, with the exception of serious criminal offences that were punishable by death, mediation was the general approach to dealing with cases that involved foreigners.<sup>34</sup> That approach reflected jurisprudence during the Qing Dynasty, and it represented the legal embodiment of Confucius’ ethical norms.<sup>35</sup> A typical jurist opinion regarding the practice of this principle appeared in a report by Commissioner Ruan Yuan. Ruan once reported to the royal court about the handling of a murder case that involved several British sailors on board the *Topaze*. He reckoned the British soldiers committed crime in in-land shall be considered as criminal offences involving aliens. The case shall be trailed in China according to Chinese law.<sup>36</sup>

At that time, most of the incidents involving foreigners were dealt with on a case-by-case basis. Officials in charge

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<sup>34</sup> George Staunton also noticed that Chinese officers tended not to enforce Chinese law upon the foreigners who lived in their jurisdictions. *Ta Tsing Leu Lee*, trans. George T. Staunton (London 1810), 36n. Also Philip C. C. Huang, "Court Mediation in China, Past and Present," *Modern China* 32, no. 3 (2006). R. Randle Edwards, "Ch'ing Legal Jurisdiction over Foreigners," in *Essays on China's Legal Tradition*, ed. Jerome Alan Cohen, R. Randle Edwards, and Fu-mei Chang Chen (Princeton: Princeton University Press, 1980). And Jingfan Zhang, ed. *Qingchao Fazhishi (Legal History of the Qing Empire)* (Beijing: Zhonghua Shuju, 1998). 548-83.

<sup>35</sup> Derk Bodde and Clarence Morris, *Law in Imperial China* (Pennsylvania: University of Pennsylvania Press, 1973). 5.

<sup>36</sup> Edwards, "Ch'ing Legal Jurisdiction over Foreigners.".

often noted, in their rulings and royal reports, that the judgements were strictly based on the spirit of Chinese jurisprudence accommodating both *tianli* and *renqing*. In 1839, Qing issued a decree, which made opium smuggling as a crime punishable by death. According to this newly announced rule, the primary offender of opium smuggling, foreign or Chinese, faced the death penalty by decapitation while the accomplice would receive death penalty by hanging, in accordance. Lin, who was trying to inform the British government about the new regulation, followed China's legal tradition of mediation, and he claimed the British offenders had shown remorse, therefore they could be exempted from the death penalty.<sup>37</sup> This reveals the general spirit of the Qing government's legal system when dealing with foreigners.

### **B. 'Gongfa' from Missionaries' Perspective**

Missionaries' legal translations appeared to propagate the inclusiveness of Christian universalism by emphasising the natural law characteristic of international law. Civilisation becomes a moral principle, rather than a legal concept, and that suggests there is a limitation to the applicability of international law. Such a demonstration of Christian universality disguises the colonial tendency in the natural law tradition after Grotius. It also omits the 19<sup>th</sup>-century legal positivists' acknowledgement of international law being a law of will and consent. The idealistic approach to understanding international law sets the tone for the Chinese reception of international law in the late 19th century. It also establishes the intellectual context for the Chinese reception of Western political concepts, such as the individual and their rights.

Four years after the signing of the *Treaty of Tien-Tsin*, in 1862, under the recommendation of Anson Burlingame and Robert Hart, Martin, then an interpreter for the U.S. Envoy

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<sup>37</sup> Fang and Zhou, *Linshi Jiancang Lin Zexu Shi Yuan Liangguang Zougao*. 90 and 93.

Extraordinary and Minister Plenipotentiary to China, William B. Reed, began to translate Wheaton's work in Shanghai with the assistance of four Chinese Christians, He Shimeng, Li Dawen, Zhang Wei and Cao Jingrong.<sup>38</sup> In 1864, Martin was called to Beijing. With the support of Prince Gong, he worked with Chen Qin, Li Changhua, Fang Junshi and Mao Hongtu. The translation was soon used as a textbook to train Chinese diplomats. Martin was appointed chief instructor and president of Tung Wen College in 1869. With the help of his Chinese colleagues, Martin also translated Theodore Dwight Woolsey's *Introduction to the Study of International Law* (first English version published in 1860, Chinese version published in 1878), Johann Kaspar Bluntschli's *Das Moderne Völkerrecht der Civilisierten Staaten als Rechtsbuch dargestellt* (German version published in 1868, Chinese version in 1879)<sup>39</sup> and William Edward Hall's *Treatise on International Law* (English version published in 1880, Chinese version in 1903). Martin's translation of *EIL* provided the Chinese equivalents for Western legal concepts such as sovereignty (*zhuquan*), right (*quan*), nation and state (*guo*). The Chinese words '*manyi*' and '*jiaohua*', in this translation, were used as equivalents of 'barbarian' and 'civilized'.

Wheaton's work appears to be influenced by natural law tradition. He recognised the importance of self-preservation in international conduct, and he agreed that law of nations was 'nothing but the law of nature applied to nations'. Wheaton shares another concern with the natural law theorists. To Wheaton and Grotius, only by acquiring sovereignty can a state be considered in the scope of international law, and regarded as a participant in the modern world order. Being a civilised nation is the foundation for becoming a sovereign nation. The basis of human civilisation comes from the unity of Christendom. Therefore, he recognises the domination of the making of international law by Christian countries, as well as their

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<sup>38</sup> 京都崇實館存版，同治三年鐫《萬國公法》。Translator's preface in *WGPF*.

<sup>39</sup> The Chinese translation is based on the French translation.

obligations to spread this fruit to contribute to the promotion of the progress of civilisation.<sup>40</sup> Such arguments are in line with Grotius.

Despite the natural law influence, Wheaton's main approach is more positivistic. He argues the earlier attempts to deduce international law from a theory were rather unrealistic. He notes the traditional theories of international law assume an independent nation will work for international advantages. Wheaton intends to produce a practical international law. He attempts to depict the rights and obligations of a sovereign state, and to construct the state as a subject of international law, to solve the problems in international interactions.

Wheaton suggests that natural law fails to provide any form of higher sanction. It remains as 'the law of God'. To Wheaton, consent from civilised nations is a more reliable sanction compared with the 'higher sanction' from the divine. Therefore, he builds his work on the 'intercourse of States, the discussion and decision' from 'all civilised nations profess to be bound in their mutual intercourse'. He also uses 'sources of information in the diplomatic correspondence and judicial decisions' from the USA.<sup>41</sup>

However, the complexity in Wheaton's work, especially his connection with and deviation against 17<sup>th</sup>-century European natural law tradition, was eliminated from Martin's translation. Martin's interest was in seeing international law as 'the mature fruit of Christian civilisation'. It was a reflection of God's law, which could be 'inscribed on the human heart'. Martin's argument was a natural theology, and he used international law as a form of secular knowledge to argue for the universality of Christian moral norms.<sup>42</sup> He hoped by using international law he could correspond to the Chinese tradition, and then pave an easy way to demonstrate Christian universality. Martin

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<sup>40</sup> Henry Wheaton, *Elements of International Law*, (ed.) Richard Henry Dana Jr., 6 (ed.) (Boston: Little, Brown, and Company, 1866). 13, 32, and cxc–cxci.

<sup>41</sup> *EIL*, 14, cxcv–cxevi, and xcii–xciii.

<sup>42</sup> Covell, W. A. P. *Martin: Pioneer of Progress in China*. 149, and 110-25.



acknowledged the analogous concept of principles to regulate ‘peace and war’ had already come into existence during the Zhou Dynasty in China.<sup>43</sup>

Martin’s intension could also be discerned through the omitted texts in his translation. The first chapter of Wheaton’s work was a theoretical discussion in which he stated his positivistic view. However, Martin systematically pretermitted this legal discussion and the resulting case studies. Also, none of Wheaton’s prefaces to the sixth edition were translated. To Martin, the natural law tradition appeared to be more appealing and easier to accept. For example, in Chapter 1, Section 6, Wheaton discussed Cornelius van Bynkershoek’s work. Wheaton argued van Bynkershoek, despite writing in the age of natural law, managed to conceive the importance of practice in the consolidation of the law of nations. According to Wheaton, van Bynkershoek believed the law of nations derived from ‘reason and usage (*ex ratione et usu*)’.<sup>44</sup> Martin used the Chinese legal term ‘*li* (例)’ to translate ‘*usu*’.<sup>45</sup> In the Chinese legal structure, ‘*li*’ functions almost as precedent in the common law system.<sup>46</sup> As supplements for *lǜ* (律) (code), *li* is an accumulation of previous legal cases. It is legally binding, and it provides a reference for subsequent trials of a similar nature. However, ‘*usu*’ suggests a very important positivistic perspective of the law of nations. It suggests the ‘practice’ of all the nations, which cannot be considered as legal precedent, since there is no code in existence. Wheaton elaborates on van Bynkershoek’s argument that ‘the law of nations is only a presumption founded upon usage, and every such presumption ceases the moment the will of the party who is affected by it is expressed to the contrary’.<sup>47</sup> This crucial section showcases the classic 19<sup>th</sup>-century legal positivism, which believes the sanction

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<sup>43</sup> Translator’s preface in *WGGF*.

<sup>44</sup> *EIL*, 8.

<sup>45</sup> *WGGF*, 4.

<sup>46</sup> Regarding the definition of ‘*li*’ in the Chinese legal system, please refer to Gao Chao et al., (eds), *Zhongguo Gudai Faxue Cidian* (Tianjin: Nankai University Press, 1989). 200.

<sup>47</sup> *EIL*, 9.

in international law is purely based on the collective will of the sovereigns. Without the ‘*usu*’ from the sovereigns, international law as a presumption will then cease to be in existence. In Martin’s translation, this crucial position of ‘*usu*’ for the law of nations is eliminated. He uses ‘公法出於常例，若明言不從此常例，則例不復為常例也’ to translate van Bynkershoek’s words.<sup>48</sup> This ambiguous statement literally reads as ‘public law originates from general practices (precedent), if (someone) clearly states not following this general practice (while dealing with a specific case), then this particular case will no longer be considered as (part of the) precedent.’

In Wheaton’s translation, ‘*gongfa* (公法)’ is almost like the divine law. Its existence is completely irrelevant to the general practice of all the sovereigns and nations. Martin’s translation treats ‘*changli*’ (general practice) as the foundation of ‘*gongfa*’. If a case deviates from the general practice, then it will be disqualified as a general practice. This contradicts van Bynkershoek. Wheaton also quotes August Wilhelm Heffter’s theory and the related discussions. As Heffter argues, the words ‘international law’ (*droit international*) cannot truly express the idea of ‘*jus gentium*’ (law of nations) proposed by Roman jurists.<sup>49</sup> In Martin’s translation, the term *droit international* is translated as ‘*zhuguo zhifa*’ (law from all nations), while the term ‘*gongfa*’ is used to translate *jus gentium*.<sup>50</sup> According to Heffter’s explanation, *jus gentium* ‘consists of two distinct branches’; first, it suggests ‘human rights in general’<sup>51</sup> and, second, it refers to direct relations between states.<sup>52</sup>

Wheaton notices the latter connotation is largely received by the world as the denomination of international law, which, as he sees, shall be called ‘external public law’. In Martin’s

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<sup>48</sup> WGGF, 5.

<sup>49</sup> EIL, 16.

<sup>50</sup> WGGF, 9

<sup>51</sup> Martin translated it as ‘世人自然之權’ (*shiren ziran zhi quan*), which literally means ‘the natural rights of all the people in the world’.

<sup>52</sup> EIL, 16.

translation, ‘external public law’ is translated as ‘外公法 *wai gongfa*’, while its corresponding concept, ‘internal public law’, is referred to as ‘私權公法 *siquan gongfa*’. By doing this, Martin gave the term ‘*gongfa*’ a universal nature, which is not only applicable to international conduct, but also to individual interaction.

Martin’s intention to establish modern international law as an example of Christian universality can also be found in other places in his translation. By analysing the works of Wolf, Puffendorf, and Grotius, Wheaton argues international law can only have legal binding force when nations are willing to be bound by it. ‘Law of nations’ is the ‘natural law of individuals applied to regulate the conduct of ... states’. To the states, ‘they are not less bound to submit to the law which flows from it than they are bound to submit to the natural law itself’. The practice, or custom, still functions as the source of sanction in international law. The custom will be included ‘so far as it does not conflict with the natural law’. In this sense, natural law is not the sole origin of modern international law, but it provides a moral foundation for recognising the legitimacy of these practices, which in the eyes of positivism should be the source of international law. Therefore, even to Grotius, ‘voluntary Law of Nations’ is a more appropriate term.<sup>53</sup> Martin’s translation of this section has an intriguing twist. According to the Chinese version, international law is slightly different from natural law principles because of the need to meet the general interests of all the nations.<sup>54</sup> However, all the nations should follow this rule just like they have to follow the principles of their common law. If this principle does not conflict with the natural law, it should be adopted by all nations as a common practice, which Grotius describes as ‘the law that all the nations obey’. Similar to his approach in interpreting van Bynkershoek’s argument, Martin disguises Wheaton’s attempt to discover positivism in the natural law tradition. Martin uses ‘*xingfa*’ to translate

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<sup>53</sup> *EIL*, 10.

<sup>54</sup> *WGGF*, 6.

exclusively the concept of ‘natural law’, yet uses ‘*lifa* (理法)’ to interpret ‘common law’ and ‘natural law’ interchangeably. He also distorts the idea of law of nations being a ‘voluntary’ law by translating Grotius’s idea of ‘voluntary law of nations’ into ‘the law that all the nations obey’.

Martin’s attempt to describe 19<sup>th</sup>-century international law as a Christian knowledge that expresses the universality generally applicable to everyone is reflected in many of his other translations of international law writings. He reads international law as natural law extended to nations. He says ‘*gongfa*’ is ‘*xingfa*’.<sup>55</sup> To Martin, natural law is almost equivalent to divine law. In the translation of Woolsey’s *Introduction to the Study of International Law*, Martin added the same atlas of two hemispheres as the one in *WGGF*. To Martin, it shows the unity of people as well as the divine rule of heaven.<sup>56</sup> A similar attitude can be found in John Fryer’s translations of international law writings. In Fryer’s translation of Edmund Robertson’s definition of ‘international law’, Fryer makes the expression sound like international law is a natural regulation that is followed by all civilised nations.<sup>57</sup> Like Martin, Fryer treats international law as a given rule that precedes national practice. Therefore, it is important to recognise such a rule in order to be considered civilised.

#### 4. ‘*Chunqiu Gongfa*’: A Chinese Perspective

With the translation of international law, and with the expansion of Western legal and political education in China, Chinese intellectuals began to notice two interconnected issues; first, the necessity of transforming the imperial vassal into the modern citizen as a crucial base for modern Chinese nation

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<sup>55</sup> 《公法會通》，光緒六年同文館聚珍版。Johann Caspar Bluntschli, *Gongfa Huitong*, trans. W.A.P. Martin (Beijing: Tongwenguan, 1880).

<sup>56</sup> 《公法便覽》，光緒三年同文館聚珍版。Theodore Dwight Woolsey, *Gongfa Bianlan*, trans. W.A.P. Martin (Beijing: Tongwenguan, 1877).

<sup>57</sup> 富強齋叢書續全集，光緒庚子七月小倉山房校印《公法總論》。Edmund Robertson, *Gongfa Zonglun*, (ed.) Yuan Junde, trans. John Fryer, Fuqiangzhai Congshu Xuquanji (Shanghai: Xiaocang Shanfang, 1900).

building; and second, to introduce and study the concept of ‘*gongfa*’, to provide a sense of equality and universal regulation for both domestic and international politics. Some scholars consider the term ‘*gongfa*’ to be the Chinese equivalent of international law. However, ‘*gongfa*’ in Martin and Fryer’s translations appears to be a divine law concept. Logically, it should be closer to the idea of the ‘law of nations’ rather than ‘international law’. The previous term is widely used in natural law tradition, while the latter is used in the legal positivism tradition. Writings by China’s early reformists, including Zheng Guanying and Kang Youwei, appear to be closer to the missionaries’ interpretation of ‘*gongfa*’.

The Chinese translation of *EIL* has an intriguing title: *Wanguo Gongfa*. ‘*Wanguo*’ literally means ten thousand countries. To Martin, the fall of the Zhou Dynasty unveiled the inception of national boundaries in China. The feudal lords were the European equivalent of nations that planted the need to introduce rules to regulate conflicts between states.<sup>58</sup> Unlike the Chinese concept of ‘*tianxia*’, ‘*wanguo*’ assumes an equal world order with clear national distinction. ‘*Gong*’ not only implies the existence of an abstract and great good, it also suggests an idea of general agreement that defines the word ‘*fa*’ (regulations and rules). ‘*Gongfa*’, in this sense, is not just a regulation accepted by individual subjects that enjoy an absolute equality among themselves, it is also a law that functions on the highest level and serves the greater good among its subjects. The concept of ‘*gongfa*’ generally forms a system, on which more Chinese concepts, such as ‘*ren*’, ‘*min*’ and ‘*guo*’, interact in the context of Western expansion and nation building.

To the Qing officials, Chinese law was also based on universal principles, which also applied to foreigners. Prince Gong once argued the Qing government’s law had been translated into foreign languages, yet China did not compel foreigners to obey it, so how could foreigners impose their legal

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<sup>58</sup> *WGGF*, 1.

regulations (the international law) on Chinese?<sup>59</sup> To Yixin, the translation of foreign legal documents merely provided a necessary convenience for Chinese officials who conducted negotiations with foreign countries.<sup>60</sup> Although many Qing officers shared general unease about applying international law, some agreed it was a benefit to use Western legal concepts in international interactions, and to resolve international disputes.<sup>61</sup> Under Confucius' universalism, many Qing officials had a positivistic understanding of European international law.

As early as 1848, Xu Jiyu, then-governor of Fujian province, began to think of European international relations as being similar to China's situation during the Warring States period. The decay of a unified empire led to the emergence of the contesting of small states.<sup>62</sup>

A similar analogy appeared in Feng Guifen's works. Feng was a major figure in the Qing Self-strengthening movement. He believed the realpolitik among European nations was similar to events during the Spring and Autumn Warring States period. The power struggles and betrayals were disguised in the language of moral principles and good faith.<sup>63</sup> Such a correlation was further developed in the forward of *WGGF*, written by Zhang Sigui, a political advisor to Zeng Guofan and later a Chinese diplomat to Japan. Instead of calling this book *Wanguo Gongfa*, Zhang titled it *Wanguo Lüli*.<sup>64</sup> As previously explained, the terms 'lǚ' and 'lǐ' suggest legal codes and precedents, while 'fǎ' is the guiding universal principle. Martin might not have noticed this subtle difference, but he did appreciate the analogy that compared Chinese principalities' relations in the Spring and Autumn period with European international relations.<sup>65</sup>

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<sup>59</sup> Yixin, 'Memorial,' in *Chouban Yiwu Shimo, Tongzhi Chao* (Taipei: Wenhai Press, 1966), 2701-4.

<sup>60</sup> Ibid, 2701-2.

<sup>61</sup> Ibid, 25-6.

<sup>62</sup> Jiyu Xu, *Yinghuan Zhilue* (Shanghai: Shanghai Shudian, 2001). 105.

<sup>63</sup> Guifen Feng, *Xiaobinlu Kangyi* (Shanghai: Shanghai Shudian, 2002). 58. Feng's work was originally published in 1861.

<sup>64</sup> *WGGF*, 5.

<sup>65</sup> Martin, *A Cycle of Cathy, or China, South and North with Personal Reminiscences*. 205.

In 1883, Martin published an article in *The International Review*. In that article, he explained that a system of guiding principles, recorded in Confucius' canons, and which regulated interstate conduct, functioned as China's ancient international law.<sup>66</sup> He acknowledged the general code among those Chinese states during that period should be considered *jus gentium*.

Martin's reading of *Chunqiu Gongfa* served his ambition of establishing the analogy between Confucius' moral principles and Christian norms.<sup>67</sup> However, to Chinese Confucian intellectuals, *Chunqiu Gongfa* had the potential to provide a guiding principle to explain the expanded world picture, which included Europe and America. During the mid-1870s, Zheng Guanying stated, in his 'Lun Gongfa' (On Public Law),<sup>68</sup> it was important for China to understand the similarities and differences between Chinese and international laws, to conduct international interactions. Zheng believed Martin's Chinese translation of Wheaton's *EIL* was a good resource. Based on the same analogy, Zheng argued *gongfa* was based on the principles of 'tianli' and 'renqing'. Hence, by obeying 'gongfa', states could operate in an environment that was beneficial to both the prosperity and morality of the people.<sup>69</sup>

Chinese intellectuals' attitudes toward 'gongfa' seemed to be ambiguous. On the one hand, they realised *gongfa*'s alien legal and political connotations; yet, on the other hand, they also intended to integrate *gongfa* into China's world view, under the belief of 'Chinese corpus and Western application', or into a utopian view of world harmony. Zheng Guanying's 'Gongfa' (Public Law, 1881) systematically connected the use of international law with domestic politics. Despite having been published in 1881, the article was composed in the 1860s when

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<sup>66</sup> "Traces of International Law in Ancient China," *The International Review* XIV, no. 1 (January 1883).

<sup>67</sup> Ibid. 68.

<sup>68</sup> This article appears in the collection *Yi Yan* (易言), which contains 36 articles. The collection was published in 1880. But the article was written in the mid-1870s. There is another collection which contains 20 articles published in 1881. An article quoted later is called 'Gongfa' which exists in the latter version. Both versions start with the article about public law.

<sup>69</sup> Xia Dongyuan, (ed.) *Zheng Guanying Ji*, 2 vols., vol. 1 (Shanghai: Shanghai Renmin Press, 1982), 66-7.

Zheng worked as a comprador for Dent & Co. in Shanghai. During that period, many international law writings were translated and used as guidelines for international activities, especially commercial, in China. To Zheng, it was essential to have a common ground for daily international commercial practices. Zheng stated that '*gongfa*' had existed in China since the Zhou Dynasty. It was a grand treaty generally agreed by all nations under *tianxia*. However, the idea of *tianxia* did not imply the merging of all nations into one, but the formation of a bloc that acknowledged national sovereignty.

*Gongfa* must be based on a generally accepted rule. In Zheng's interpretation, the divine authority from *tianzi* (literally the Son of Heaven) is such a rule. It sits above the national interests and rules over *tianxia* with benevolence and just by recognising the difference among nations. Although the structural relationship between general authority and sovereignty may change over time, and the actors (i.e. the nation or the feudal state) may be different as well, the principle of having a general rule remains immutable. Zheng's *gongfa* idea addresses two aspects of *jus gentium*, and those are the aspects of the internal and the external public laws contained in Martin's translation of Wheaton's international

Instead of seeing *gongfa* as a rule that unconditionally provides asylum equally for all nations, Zheng points out that national sovereignty is the condition for acquiring the rights stipulated by *jus gentium*. Therefore, self-strengthening (*zhiqiang*) becomes the key issue for China. As expressed in his article 'Zhiqiang Lun' (on Self-strengthening), Zheng quotes a Portuguese diplomat, who said China can only resist foreign repression if its own people unify.<sup>70</sup> The issue of modernising the people becomes the foundation for transforming China into an equal legal party in the practice of international law.

Steering away from Martin's idealistic vision, Chinese reformists viewed the principles of international conduct as

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<sup>70</sup> Ibid., 175-7, 389, and 339.



arising from realpolitik. Chen Chi approaches the issue of *Chunqiu Gongfa* through the power struggles of states. *Chunqiu Gongfa* emerged when the most powerful prince took the Zhou emperor hostage and issued orders to others in the name of benevolence of the emperor.

Despite the unjust nature of warfare in *Chunqiu* period, the world did benefit from this action of peacemaking. Chen accepts that ‘*gongfa*’ emerged from Europe. He believed the 19<sup>th</sup>-century European power struggle was no different than what China experienced during the Spring and Autumn period. Therefore, ‘*gongfa*’ should be considered a universal principle that can be applied by, and to, China. He explains there are two bases for law of nations, namely ‘*de* (德)’ and ‘*li* (力)’. The first is to ensure the justice of the principle, while the second is the condition necessary for all nations to obey the principle.<sup>71</sup> Unlike Martin’s translation, Chen’s understanding of the law of nations is close to the positivist argument in the 19<sup>th</sup>-century Euro-American world.

The diplomats of China in the late 19<sup>th</sup> century also held a more realistic attitude toward international law. Officials serving as front line diplomats were aware of the colonial nature in the 19<sup>th</sup>-century practice of international law. In 1892, during his mission to Europe, Xue Fucheng continued to interpret contemporary European international relations through his knowledge of China’s Spring and Autumn period. He noticed that China’s then-focus on cultural development, rather than military strength, left China in a disadvantaged position. That was similar to the mistake made by the Zhou emperor during the Spring and Autumn period.<sup>72</sup> Xue thought it was dangerous for China to be excluded from the principles of international law. He argued although international politics was mainly a power balance, the existence of international law as a generally accepted principle helped maintain peace in Europe.

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<sup>71</sup> Chen Chi, *Chen Chi Ji*, (ed.) Shugui Zhao and Liya Zeng (Beijing: Zhonghua Shuju, 1997), 111.

<sup>72</sup> Xue Fucheng Xue, *Chushi Ying Fa Yi Bi Siguo Riji (Dairies Recording the Diplomatic Mission to Britain, France, Italy, and Belgium)* (Changsha: Yuelu Shushe, 1985). 477-8.

Xue's understanding of universality is reflected in his support of '*bianfa*'. To Xue, '*fa*' indicates the actual skills used for governance, which he refers to as '*zhishi fa*' (治世法). He believes as the fundamental principle of '*fa*' is universal, China could '*bianfa*' by following the skills and practices of the West. Regardless the difference of language and custom between China and foreign nations, their (law making endeavour) are both inspired by the spirit of nature and serving to benefit the wellbeing of the people.<sup>73</sup>

Zeng Jize holds a similar opinion. Zeng believed Western international law originated from the penal code.<sup>74</sup> Using it to regulate cases that involved foreigners was suitable under the Qing government's legal system. Although the concept of '*gongfa*' is foreign, its spirit is universal. As Chinese law, '*gongfa*' is also based upon '*qingli*' (情理). This argument corresponds with the general principles of Chinese jurisprudence, which emphasises '*tianli*' and '*renqing*'. Zeng believed compared with Western practice, the Chinese way of interacting with 'weak and small countries' best reflected the principle of '*qingli*'.<sup>75</sup>

Some Chinese intellectuals have shown more theoretical interest than those front-line diplomats. In *Shili Gongfa Quanshu* (Book of Substantial Truths and Universal Principles),<sup>76</sup> Kang Youwei sees '*ren*' (仁, benevolence) as the subject of civil rights. The idea of '*ren*' in this writing stands as a measure of social order. To Kang, '*ren*' is the basis of the law. Law made by mankind should serve the fundamental principle of safeguarding the equality of humanity.<sup>77</sup>

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<sup>73</sup> Xue Fucheng, *Xue Fucheng Xuanji*, (ed.) Ding Fenglin and Wang Xinzhi (Shanghai: Shanghai Renmin Press, 1987), 414, and 555-6.

<sup>74</sup> Zeng Jize, *Zeng Jize Yiji*, (ed.) Yu Yueheng (Changsha: Yuelu Shushe, 1983), 181.

<sup>75</sup> Zeng Jize, *Chushi Yingfa'eguo Riji*, (ed.) Zhong Shuhe, Zouxian Shijie Congshu (Changsha: Yuelu Shushe, 1985), 226.

<sup>76</sup> Kung-Chuan Hsiao, *A Modern China and a New World: K'ang Yu-Wei, Reformer and Utopian, 1858-1927* (Washington: University of Washington Press, 1975). 410.

<sup>77</sup> Kang Youwei, *Kang Youwei Datonglun Er Zhong*, (ed.) Zhenping Pan, (Beijing: Sanlian Bookstore, 1998), 7-8.

Kang's writings between 1878 and 1884 were heavily influenced by 'Western books' and Confucian texts. Those writings became, in large part, the foundation of his later utopian thoughts on 'the Great Community' (*datong*). In Kang's theory, neither Chinese tradition nor Western knowledge is perfect. Only by discovering a 'universalising formula' can the great unity of the world be achieved.<sup>78</sup> However, under the influence of the reasoning power he observed in Western science and logical writings, Kang attempts to scientifically define the idea of truth. Revealed in Kang's definition for the idea of '實 *shi*' (substantiality), it appears that Kang uses this word in the sense of *Logos*. It is an ultimate rule that governs both the law of nature (Kang calls it '*jihe gongli zhi fa*', which translates to the law of geometry axiom) and the law of man (*renli zhi fa*). Kang states the law of nature, such as geometry axiom, is a form of '實理 *shili*' (substantial truth), which enjoys the 'eternal substantiality' (*yongyuan zhi shi*). Another form of substantial truth, 'amphibious substantiality' (*liangke zhi shi*), is changeable with human practice. The law of man (literally law set up by man) belongs in this category. Even though the law of man is not as substantial as the geometric axiom, Kang believes it still creates a substantial impact on human society, and that it also shapes people's daily lives. The consequence of such an impact reveals the substantiality within the value of law, which can be used as an objective criterion to judge the quality of the law. Therefore, people should apply the law that is for the greater good of the public as a '*gongfa*'.<sup>79</sup> The connection between '*shili*' and '*gongfa*' forms a system that can be used to evaluate the principles and rules for achieving the utopian society.

Although most scholars see Kang's writing on the great unity as a utopian vision with a moral philosophical concern, in fact, his vision has a strong legal foundation, which Kang

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<sup>78</sup> Hsiao, *A Modern China and a New World: K'ang Yu-Wei, Reformer and Utopian, 1858-1927*. 410-411, and 416-417.

<sup>79</sup> Kang, *Kang Youwei Datonglun Er Zhong*, 5-6.

acquired while reading books and periodicals, such as *A Review of the Times*.<sup>80</sup> As a prototype of his utopian vision, Kang attempts to understand the world (in his word, ‘*tianxia*’) through two categories, namely ‘*Yili*’ (justice) and ‘*zhidu*’ (rule).<sup>81</sup> However, to Kang, the word ‘*yili*’ may have a more sophisticated meaning. Kang envisions *yili* as substantial truth, while *zhidu* contains laws created by human beings. Kang believes, to produce laws that are to people’s benefit, it is important to understand the truth of justice. Such a structuralised depiction of *tianxia* demonstrates impacts from the 19<sup>th</sup>-century development of Western knowledge based on the recognition of nation states. Kang’s vision of ‘*gongfa*’ is based on a detailed examination of the laws imposed by ‘nations on all the five continents’. As revealed in his appendix, *WGGF*, legal documents from all other countries and dictionaries of various languages can be used as resources for understanding and elaborating on the idea of ‘*gongfa*’.<sup>82</sup> Even with a strong influence from Western knowledge, Kang’s Utopia remained under his general acknowledgement of the *tianxia* world order.<sup>83</sup>

With the ambition of constituting a ‘*tianli*’ based on the acknowledgment of Confucius’ universalism, Chinese *Chunqiu Gongfa* discussions should be understood outside the general framework of impact/reaction. As those Chinese reformist intellectuals realise, the effort to maintain the heavenly principles will be useless if they are not supported by power. The petition for political reform is legitimised by such a legal discussion. During the 19<sup>th</sup>-century power struggle, the Qing Dynasty was certainly on the losing end. The political reform, and later the revolution, called for a more-thorough transformation. Foreign-trained intellectuals, such as Shen Jiaben, Tang Yueliang and Cao Rulin, became the dominating

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<sup>80</sup> Hsiao, *A Modern China and a New World: K'ang Yu-Wei, Reformer and Utopian, 1858-1927*. 419.

<sup>81</sup> Svarverud, *International Law as World Order in Late Imperial China, Translation, Reception and Discourse, 1847-1911*. 81-2.

<sup>82</sup> Kang, *Kang Youwei Datonglun Er Zhong*, 3, 37, and 39.

<sup>83</sup> For discussion on Kang Youwei’s development on Confucius universalism, see Hui Wang, *Xiandai Zhongguo Sixiang De Xingqi (the Origin of Modern Chinese Ideas)*, vol. 2 (Beijing: Sanlian Shudian, 2004). 733

force during the late Qing and early republican governments. The legal and political discussions, therefore, began to focus less on the traditional concern of constituting Confucian ideas as the foundation of universality. Instead, a more Westernised discourse began to prevail in the Chinese political sphere.

## 5. Conclusion

To traditional Confucian scholars and officials, '*tianxia*' does not necessarily mark the physical boundary of China as the 'Middle Kingdom'. It is an ontological category that develops with the expanding geographic understanding of the world. Confucianism provides an epistemological foundation for understanding and regulating the orders within '*tianxia*'. By looking back at the 19th century, we can see the attempts to interpret modern Western international law through this epistemology. We can also see, however, the growing doubts among intellectuals toward the universality of Confucianism. The Qing Dynasty established its first embassy in England in 1876. Guo Songtao, as the first envoy to England, began to follow the Western code of international conduct, which generated a serious controversy among his peers back in China. However, to the Confucian officials who were on the front lines of foreign interactions, acknowledging the significance of modern international law was rather a practical choice in order to preserve the continuity of the Chinese empire.

Nineteenth century Chinese Confucian intellectuals were capable of providing practical solutions that dealt with Western power without jeopardising the universality of Confucianism. However, in 1896, after a particularly disgraceful military defeat at the hands of Japan, China began to send students abroad to seek Western-style education. A large number of the students earned degrees in law and politics. With the growing number of foreign-educated young intellectuals, the epistemological foundation of a '*tianxia*' world view was generally replaced by a Western one. By 1905, the Qing government had abolished the imperial exam, which had been used to select officials since the

seventh century in China. The policy uprooted Confucianism as the guiding knowledge of governance. The practice of using Confucius' concepts to interpret Western terminologies was gradually replaced by the use of Western knowledge to comprehend Chinese society, as well as her position in the modern global order of 'family of nations'. In 1911, just six years after this drastic political reform, a political revolution overthrew the Qing government and transformed China into a republic. That began a new era for China in its continuous search for its position in the dynamic of the world order.